

Opinion No. 57-155

July 5, 1957

BY: OPINION OF FRED M. STANDLEY, Attorney General Fred M Calkins, Jr. Assistant Attorney General

TO: Edward M. Hartman, State Comptroller, Santa Fe, New Mexico

QUESTIONS

QUESTIONS

An entity known as the Roswell Wrestling Council has certain funds in its possession. (See Analysis). Does the State Treasurer have any claim to the funds?

CONCLUSION

Yes.

OPINION

ANALYSIS

The State Armory Board of the New Mexico National Guard, pursuant to §§ 9-7-3 and 9-7-9, N.M.S.A., 1953 Compilation issued an order to all local National Guard Armory Boards requiring that all funds accruing from rental, earnings or revenue derived from any National Guard property of facilities be transmitted to the State Treasurer. In compliance with the above order the Secretary-Treasurer of the Roswell Armory Board, on May 17, 1956, remitted to the State Treasurer a draft in the amount of \$ 3,102.35. According to the minutes of the Roswell Armory Board, the above payment "cleared" their account. It is the contention of the said Board that all receipts, rentals, earnings and revenues, subsequently accruing from the use of the Unit's facilities have been transmitted to the State] Treasurer and the total amount forwarded from May 16, 1956, to date is in the amount of \$ 1,525.00.

Notwithstanding the above, an entity known as the Roswell Wrestling Council has been operating a wrestling concession and has staged wrestling performances in the Roswell Armory building. From 1948 until October, 1955, the wrestling concession was operated by the Wrestling Council, which was made up of the same National Guardsmen who have served as members of the Roswell Armory Board. This Council presently consists of the three Battery Commanders as voting members, and the Roswell Armory Board President as a non-voting member. Profits from this activity have been placed in the Wrestling Council bank account, and since October 1, 1953, varying amounts have been loaned to the Security Finance Company, located in Roswell, on an open note due every six months and drawing 5% interest.

In November, 1955, the wrestling concession was farmed out on a sliding scale percentage to a promoter who is a Chief Warrant Officer in the local unit, varying from 10% of the first \$ 599 gross receipts, to a maximum of \$ 100 if the gross receipts amounted to \$ 700 or more. From this share of the gross receipts received by the Wrestling Council, \$ 25.00 per night was paid to the State Armory Board as rental of the Armory. The balance of this money was kept in the Wrestling Council bank account and subsequently loaned to the Security Finance Company. At the present time, there is a total of \$ 4,300 on loan to the Security Finance Company by the Roswell Wrestling Council. Of that amount, approximately \$ 2,650 had been accumulated from profits resulting from the actual operation of the wrestling program by members of the National Guard in Roswell. The balance of the \$ 4,300, or \$ 1,650, has been accumulated as result of the farm-out of the concession. The said Council also has a \$ 281.48 cash balance on deposit in a checking account in a local Roswell bank.

The Wrestling Council has authorized the expenditure of \$ 1,359.58 from the wrestling fund to date for maintenance and repairs to the local unit and other facilities. It should be pointed out that the money expended has been used to maintain facilities which normally would be kept up by State funds, and apparently there has been no personal gain received by any of the parties involved.

The members of the Wrestling Council maintain that the moneys accrued by them belong to the Roswell Wrestling Council and in no way can be termed or classified as State funds. They further maintain that by the payment of a \$ 25.00 rental fee per night, compliance with State law has been achieved.

Article 7, Chapter 9, entitled "The State Armory Board Act," was passed in 1953 and extensively amended portions of the old act regarding fiscal policies pertaining to armory facilities. The enactment prior to passage was endorsed by the Adjutant General of the New Mexico National Guard and his staff officers. The apparent intent of the Act was to transfer the management of local unit facilities from the local Armory Boards to the State Armory Board created by the Act. As previously indicated, the Adjutant General, in order to implement the act and carry out the intent of the Legislature, construed the said act as to give it a retroactive effect by ordering all funds which had accrued to the local Armory Boards to date to be transmitted to the State Treasurer.

Statutes pertinent to the instant case are found in Article 7, Armories, Camps and Other Facilities, of Chapter 9 pertaining to military affairs. Section 9-7-3, supra, relates to the creation of the State Armory Board, the power and duties of the Board, and, in part, is as follows:

"Whenever any arsenal, armory, stable, depot, storehouse, camp ground, rifle range, or other agency or facility for the use of the national guard is owned, rented or leased by the state, the same shall be under the charge of the state armory board. The state armory board shall consist of the adjutant-general and two (2) others, at least one (1) of whom shall be a commissioned officer of the national guard. Said board shall prescribe and promulgate such rules and regulations as it deems necessary for the direction of

the local armory boards in the management, control, rental for public use, and accounting for the revenues derived from said military facility."

Title to all buildings and armories were vested in the State Armory Board by virtue of the above section, which states:

"The title to sites and buildings for armories and other military purposes purchased or acquired heretofore are hereby vested in the state armory board and such property hereafter acquired shall be taken in the name of the state armory board."

As to the upkeep of National Guard buildings and facilities, the Legislature specifically vested that duty in the State Armory Board by the following language found in § 9-7-3, to-wit:

"The state armory board shall make such repairs to arsenals, armories, stables, quarters, camp grounds and rifle ranges, depots and storehouses owned by the state as may be necessary to keep same in good and serviceable condition from funds appropriated or otherwise made available for that purpose, and all moneys expended for the erection or repair of such buildings, grounds, and target ranges shall be expended by the state armory board in the same manner as other moneys appropriated for military purposes are authorized to be expended. The members of the state armory board shall be appointed by the governor."

It is clear that the Legislature intended that the maintenance of buildings should be controlled by the State Armory Board, which, in turn, applies to the Legislature for the necessary funds by appropriation.

There is no question but what the local Armory Boards may still execute leases on any buildings, ground or target range owned by the State, but the manner of doing so is controlled by statute at § 9-7-8, N.M.S.A., 1953 Compilation, which states:

"The armory board may execute a lease on any building, ground or target range owned by the state, for a period of not to exceed five (5) years, with renewal privileges thereon, at such rate of compensation as the state armory board shall deem just and reasonable, when said buildings, grounds, or target ranges are not required for military purposes; Provided, that said lease shall not become effective until the governor shall have approved same; Provided, further, that any lease or license covering any building, ground, or target range, shall be revocable at the pleasure of the governor, and no action shall accrue against or liability shall be incurred by the state by reason of the revocation of such lease or license. Provided, further, that local armory boards shall have complete control of any arsenal, armory, stables, quarters, grounds and charge of ranges, depots, or storehouses, within their respective jurisdictions, subject only to the supervision of the state armory board or such other boards or officers as provided by law."

It should be noted that the State Armory Board necessarily must approve the amount of rent charged and the lease must be approved by the Governor.

In order to supplement a direct legislative appropriation to maintain the local armories, § 9-7-9, supra, states:

"all rentals, earnings or revenues derived from any of the national guard properties or facilities under the control of the state armory board shall be deposited by said board with the state treasurer, who shall keep such moneys in a separate fund to be known as 'The State Armory Board Fund' and moneys so deposited in this fund are hereby appropriated for the use of said board in carrying out the purposes of this act (9-7-1 to 9-7-7, 9-7-9 to 9-7-23). All expenditures by the board shall be upon vouchers signed by the president of said board and paid out of said fund upon warrants drawn by the state auditor."

The above section raises the vital issue which is pertinent to this opinion. Does the State Armory Board have any legal claim to the money held by the Roswell Wrestling Council? We are informed by the officers of the Roswell Wrestling Council that the fund was accumulated so that improvements could be made to the Armory and other local Guard facilities. We have been assured that no personal benefit to the members of the Roswell Wrestling Council has been received or is contemplated. Further, that a great deal of voluntary and personal effort has gone into the accumulation of the funds acquired to date which we find commendable. Notwithstanding the above, we are of the opinion that this fund constitutes State revenue which should be transmitted to the State Treasurer to be appropriated for the use of the State Armory Board in carrying out the purpose of the 1953 Act, which includes the acquiring of military facilities in Roswell and other areas as well as their upkeep.

Referring back to § 9-7-9, the statute directs that all rentals, earnings and revenues derived from any of the New Mexico National Guard properties or facilities under the control of the State Armory Board shall go into the State Armory Board Fund. The funds held by the Roswell Wrestling Council, we believe, are State revenues. In *Fullerton v. Central Lincoln People's Utility District*, 185 Ore. 28, 201 P. 2d 524, the term "revenue" is described as follows:

"'Revenue' is a term generally used in referring to income of a government or governmental subdivision and as so used means all the public moneys which the state collects and receives from whatever source and in whatever manner."

Revenue has also been described as income which the state collects and receives into its treasury and which is appropriated for the payment of its expenses. (See also definitions in *Words and Phrases*, Vol. 37-A).

Anticipating the possible argument that the funds in question are the total result accruing solely from voluntary and personal effort on the part of the Roswell Unit, we think it necessary to point out the rental schedule which has been in existence and we

believe directly benefitted the Roswell Wrestling Council in accumulating the funds now held by them. A schedule of rental fees for the use of the Armory was submitted to the State Armory (which we understand has not been approved or disapproved by the State Armory Board) providing the following rental fees:

Private individual for
one night \$ 75.00
Nonprofit charitable
organizations, one
night 50.00
National Guard organi-
zations, one night 25.00
National Guard for
unit drills 0.00

Although it has been vigorously maintained that the Roswell Wrestling Council is an independent entity apart from the local Roswell Armory Board, they have benefitted in the amount of \$ 50.00 per night over that which an independent promoter would have to pay in order to rent the Armory for conducting wrestling exhibitions. We believe that the above rental differentiation materially contributed to the accumulation of the above fund. If the Wrestling Council was not composed of the Roswell Armory Board's Company officers with its President the Commanding Officer of the Unit and its stated purpose being the improvement of the local Guard facilities, its rental fees would be that of a private individual.

It is fundamental that State officials and others shall not profit from the use of public or state buildings. It is apparent in the instant case that the entity known as the Roswell Wrestling Council, for all practical purposes, operates as a subterfuge to allow moneys collected from the use of the Roswell Armory to be retained by the local Guard Unit rather than being sent in to the State Armory Board Fund as intended by the State Armory Board Act. We are of the opinion that a constructive trust has arisen in the favor of the State. In 89 C.J.S., p. 1070, at @ 152, the text relates:

" Where a person wrongfully, or without right, takes possession or assumes control of property, or receives its rents and profits, a constructive trust ordinarily arises in favor of the person entitled thereto; as where the possession or control is assumed under a mistake, or in bad faith, or with knowledge of a prior or superior claim or title."

In the case of *City of Philadelphia v. Heinel Motors, Inc.*, 16 A.2d 761, the Court there held that the receipt of tax money by a seller operates to create a constructive trust.

" A 'constructive trust'" is a relationship with respect to property subjecting the person by whom the title to the property is held to an equitable duty to convey it to another on the ground that his acquisition or retention of the property is wrongful and that he would be unjustly enriched if he were permitted to retain the property.

A "constructive trust" is remedial in character and is imposed, not to effectuate intention, but to redress wrong or unjust enrichment.

In this case, we believe money has been acquired under such circumstances that the holder of the money, the Roswell Wrestling Council, may not in good conscience retain the money received and that they hold the funds in trust for the State.

By the way of summary, we believe that the fund now held by the Roswell Wrestling Council should be tendered into the State Treasury so that the obvious intent of the statutes with reference to the obtaining of National Guard facilities as well as their maintenance can be affected. Any other holding would result in the formation of similar entities on the part of the various local units having armories subject to rental. As previously noted, the officers of the Wrestling Council are also Battery Commanders of the Roswell National Guard Unit and the avowed purpose of the Council is to retain the assets accumulated for the sole use of the local Unit. Applying a broad definition to the terms public "funds" and "revenues", we believe the assets now held by the Roswell Wrestling Council to be State funds. Admittedly, the use to which the funds have been put to date are laudable and voluntary effort no doubt contributed to the final total, but we cannot overlook the advantages extended to the Roswell Wrestling Council by the favorable rental schedule. It is our suggestion that State Comptroller confer with the Adjutant General regarding the fees of all National Guard Armories so that it may be ascertained if an adequate rental fee is now being charged by all local Boards charged with the rental of the State's military facilities.

OPINION OF FRED M. STANDLEY

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